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Supreme Court of the United States

OCTOBER TERM, 1970

No. 776

ROBERT R. RODICKER,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, AND OPPOSING BRIEF.

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ROBERT R. RODICKER,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

COMES the Respondent, Illinois Central Railroad Company, replying to Petitioner's Prayer for a Writ of Certiorari and pleads:

A.

With reference to "the question presented" as stated by Petitioner (Page 3):

1st, Respondent denies that at the time of Petitioner's injuries he was an employee of the Illinois Central Railroad Company, entitling him to the coverage of the Federal Employers' Liability Act.

2nd, Respondent denies that Petitioner accurately states the facts as contained in the record, which facts are summarized

and correctly stated by the Mississippi Supreme Court in its opinion. (Petitioner's Brief page 15 "Appendix A".)

3rd, Respondent denies that the record in the trial court presented an issue of fact for the jury.

4th, The undisputed evidence is that at the time of Petitioner's injuries he was an employee of the New Orleans Union Passenger Terminal; he was doing its work and was under its exclusive direction, supervision and control.

B.

With reference to "Reasons for Granting Writ" as stated by Petitioner (p. 7):

1st, Petitioner's first reason is not valid for the reason that Petitioner at the time of his injuries was not an employee of Respondent Railroad. He therefore, has no claim against Respondent under the Federal Employers' Liability Act.

2nd, Petitioner's second reason that because of the three-year statute of limitations he cannot now bring an action against the UPT is without merit. Petitioner has no one to blame but himself and his counsel for ignoring the facts and refusing to follow the law and allowing the statute of limitations to run on any action which he might have brought against the UPT.

3rd, Petitioner misinterprets the cases from this and other courts, which are cited in his Brief. These cases do not support the Petition for Writ of Certiorari.

WHEREFORE, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

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BRIEF OF RESPONDENT.

Because the unanimous opinion of the Mississippi Supreme Court as written by Mr. Justice Smith (Petitioner's Brief page 16 "Appendix A") so succinctly and accurately refutes every argument which Petitioner advances, further Brief by Respondent is probably unnecessary. We confidently rely upon that opinion. The remainder of this Brief will merely amplify and support the decision appealed from, repeating much of Respondent's Brief filed in the Mississippi Supreme Court.

I. STATEMENT OF THE CASE.

Petitioner's Statement of the Case is incomplete and misleading. It does not cover those facts which are material for determination of the question here presented, that is, *whose was the right of supervision and control over Petitioner at the time of his injuries.*

The opinion of the Mississippi Supreme Court accurately summarizes the evidence as contained in the record, which as stated by the Court in its opinion, is undisputed.

A more comprehensive statement of the facts with record references we believe, however, will be beneficial to the Court.

The New Orleans Union Passenger Terminal, hereafter referred to as UPT, *is a railroad.* It was created by an amendment to the Constitution of the State of Louisiana, Article 14, Section 31.3, Act 385 of 1938. This railroad is owned and operated by the City of New Orleans. Its overall operating body is a board of directors. It operates in interstate commerce and is subject to the rules and regulations of the

Interstate Commerce Commission. It has the power to sue and be sued and the right of eminent domain (R. 237-239). The UPT, or the City of New Orleans through it, owns tracks and operates equipment, and the area of its operation is well defined (R. 299). Its employees number about 275 (R. 256). It has its own Book of Rules governing its operating department (R. 249, Ex. 2, Wallace testimony). The yardmen, which included Petitioner, work under an agreement between UPT and the Brotherhood of Railroad Trainmen (R. 243, Ex. 1, Wallace testimony). The chain of authority for the operation of UPT is from C. J. Wallace, the Terminal Manager, whose responsibility is to the Board of Directors, to the trainmaster and yardmaster, and to the engine foreman of each operating crew within the Terminal (R. 240, 250, 288).

Six railroads operate passenger trains in and out of the Passenger Terminal—the KCS, the T&P, the Southern, the Southern Pacific, the L&N, and the Illinois Central (R. 197). Approximately 15 passenger trains per day come into the Terminal from these railroads (R. 291). Upon reaching the Terminal yards these trains, as they are brought in by their own operating crews, become subject to the control of the tower director, who, as an employee of UPT, directs their movement by lining the switches and signals (R. 312). At this point UPT and its switching crews take over in conducting the switching operations within the Terminal.

By agreement between the six railroads and the Brotherhood of Railroad Trainmen the yardmen comprising the switching or operating crews within the Terminal were to come from the rosters of these railroads. Each railroad was allocated a certain number of these jobs on the basis of a quota worked out among them. These jobs were claimed on the basis of seniority,

with the trainmen maintaining their seniority on their home roads. If a trainman's seniority entitled him to a Terminal job regularly, and he remained on a Terminal job for any length of time, he received his vacation from the Terminal, otherwise from his home road (R. 257).

Petitioner, in stating that while working at UPT he remained under the rules and instructions of the Illinois Central, has misquoted the record. The crew of which Petitioner was a member was operating under the "*Rules of the Operating Department of the New Orleans Union Passenger Terminal.*" The UPT in establishing rules for its operating department adopted the rules and instructions of the respective railroads coming into the Terminal with a number of exceptions and additions. Petitioner, therefore, in working on the UPT job at the time of the accident was subject to UPT rules and regulations and not the rules and regulations of Respondent railroad (R. 249).

The members of the operating crews, made up of trainmen from the various railroads, in the performance of their duties received no orders or instructions from the Illinois Central Railroad or from any of the other railroads whose trains run in and out of the Terminal (R. 289).

On any given day a three-man switching crew, such as the crew of which Petitioner was a member, might be made up of trainmen from three separate railroads, all taking their orders and instructions in the performance of their duties from the UPT yardmaster. This was not an arbitrary arrangement of the Terminal but was in accordance with the wishes and the agreement made between UPT and the Brotherhood of Railroad Trainmen (R. 242, Ex. 1, Wallace testimony).

These operating crews made up of yardmen from the various railroads were under the supervision, control and orders of the UPT yardmaster. They did not receive orders from anyone else. (R. 289.)

The Illinois Central was Petitioner's home road. He had worked various jobs in Respondent's freight yards, all of which were separate and distinct from and not within the area of the UPT yard (R. 35). While working these Illinois Central freight jobs the crews performed general switching operations and always under the supervision and control of the Illinois Central yardmaster (R. 38). While working a Terminal job the crews were under the supervision and control of the UPT yardmaster.

The job that Petitioner was working at the time of the accident was Job No. 5, beginning at 11:55 P.M. He obtained this job by virtue of his seniority (R. 41). He reported for duty to the switchmen's shanty in the Terminal yard (R. 42). He was the "helper", the other members of the crew being Engine Foreman L. H. Barnett and Engineer C. E. Kaul (R. 46). Their home road was the Illinois Central. They bid their jobs by virtue of their seniority. The yardmaster was Edward Hornsby, who had been a regular employee of UPT since its inception, April 16, 1954 (R. 285). The record is replete with testimony that Petitioner as the helper in the crew, Kaul as engineer and Barnett as the Engine Foreman all took their orders and instructions from Mr. Hornsby, the UPT yardmaster. This is undisputed. There is no evidence to the contrary. Petitioner, Barnett and Kaul made out "time slips" to UPT (R. 46, Ex. "B").

Kaul had worked Job No. 5 for five or six days, having bid it in a regular job for a period of 120 days. On one occasion he

had worked as a fireman on a Terminal job for a year (R. 180, 181, 185). Barnett had been working Job No. 5 for quite some time (R. 283).

Petitioner testified that he had worked on UPT jobs previously with trainmen from other railroads. Therefore, when he reported for work on Job No. 5 he could very well have found himself working with an engine foreman whose "home road" was a railroad other than IC and an engineer whose "home road" was still another of the railroads (R. 61-62).

The fallacy of Petitioner's argument that he was an IC employee at the time of the accident because the engine foreman's "home road" was IC is apparent.

The method of payment of the wages of these yardmen was worked out between UPT and the six railroads in the most convenient manner. A yardman from either of the six railroads working on a single job or for a few days only on a Terminal job would be paid by his home road, who would then bill the Terminal for reimbursement for the wages so paid. This was to avoid double charging of railroad retirement payments to the yardman. If he continued on a Terminal job beyond a two-week pay period he would then be placed upon the regular Terminal payroll. If the yardman's seniority entitled him to do so he could bid in a Terminal job for a six-month period, the calendar year being divided into two periods of January 1 to June 30 and July 1 to December 31. In that event the yardman would not be subject to being replaced during this period even by someone who might have more seniority (R. 270-283). In either event his wages were paid by UPT, and his duties were the same regardless of whether or not he was working on a Terminal job for one day, for several weeks, or for several months.

The crew on Job No. 5 was operating switch engine No. 3 (R. 52-55). This engine was owned by UPT (R. 287). The duties of the crew working this job consisted of making up and breaking up trains of the railroads coming into the Terminal, putting the cars through the Terminal washer and conducting general switching operations of cars and trains of these railroads, all under the supervision, control and direction of UPT yardmaster Hornsby. Although there was work carried over from one shift to the next, Job No. 5 generally handled five trains, one each from TCP, KCS, L&N, S.P., and IC (R. 179-180, 286-295). Petitioner himself testified that between 10:55 P.M., when he began his tour of duty, and 2:30 A.M., when the accident occurred, the crew of which he was a member switched an L&N, a Southern Pacific, and an Illinois Central train, the City of New Orleans, which train they were switching at the time of the accident. He did not remember if there were others (R. 56). This was done under the supervision and orders of Mr. Hornsby, the UPT yardmaster of ten years service (R. 178, 285).

Mr. Hornsby reported the accident to UPT who filed a report with the Interstate Commerce Commission in accordance with the regulations for reporting injuries to employees (R. 253-254, Ex. 3, Wallace testimony). Respondent made no such report.

The conclusion of the Mississippi Supreme Court on this undisputed evidence was:

> ". . .reasonable men could not differ in concluding that, at the time of his injury, Rodicker was the servant of UPT, doing its work, and under its exclusive supervision, direction and control."

II. RIGHT OF SUPERVISION AND CONTROL IS THE DETERMINING FACTOR.

In the case of *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480, this Court spelled out the "loaned servant" doctrine. That case did not involve FELA, but the rule announced therein has been cited and followed in Federal Employers' Liability Act cases for fifty years.

The Mississippi Supreme Court in *St. Louis-San Francisco Railway Company v. Porter*, 211 So.2d 530 (Miss. 1968) followed the rule laid down in the *Standard Oil* case, citing also *Hull v. Philadelphia and Reading Railway Company*, 252 U.S. 475, 40 S.Ct. 358, 64 L.Ed. 670, *Linstead v. Chesapeake & Ohio Railway Company*, 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453, and *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed.2d 709, along with *Robertson v. Yazoo & M.V.R. Company*, 159 F.2d 31 (5th Cir. 1947) and cases from other jurisdictions.

The Mississippi Supreme Court in the case at bar followed the same authorities, so it cannot be said that Petitioner's cause of action has been aborted by the Supreme Court of Mississippi. Unquestionably, the decision of the Mississippi Supreme Court in this and other cases decided by the Court is completely consistent with the "loaned servant" doctrine as interpreted and applied by the decisions of this Court and the Courts of Appeal.

III. PETITIONER'S POSITION IS NOT SUPPORTED BY THE AUTHORITIES.

Petitioner says that "the Supreme Court of Mississippi has always given a markedly restricted interpretation to the coverage of the Federal Employers' Liability Act as to the questions of employment in interstate commerce regardless of Federal decisions to the contrary". This statement is not borne out by the decisions of the Mississippi Supreme Court.

In *Gulf M. & N.R. Co. v. Myer*, 110 So. 444 (Miss. 1926) cited by Petitioner in his Brief, the evidence was that Plaintiff "at the time of the injury was simply riding on a pass as an employee without any known duty to perform while riding upon that train,. . ." Under such circumstances, the Mississippi Supreme Court said that Plaintiff could not "by a stretch of the imagination be held to be engaged in that which furthers the business of carrying on interstate commerce".

In *Wallace v. St. Louis-San Francisco Railway Company*, 120 So.2d 131, (Miss. 1960), which case Petitioner cites as eroding the principles of FELA, the uncontradicted evidence was that Plaintiff at the time of his injuries had completed his tour of duty at 9:50 A.M. and had gone to a nearby hotel where he had registered, eaten breakfast and read the morning paper. At 12:15 P.M. he decided to return to the washroom in the railroad yard to shave. In climbing over a cut of cars, he slipped and fell. The Mississippi Supreme Court held that Plaintiff was not performing any duties whatever in furtherance of interstate commerce, and in following the opinions of Judge Learned Hand in *Young v. New York N. H. & H.R. Co.*, (2nd Cir. 1934), 74 F.2d 251, and *Vostyn v. Delaware L. & W.R. Co.*, 160 F.2d

15 (2nd Cir. 1947) said "that any activity undertaken by an employee for a private purpose is certainly not within his employment".

In *Hill v. Gulf Mobile and Ohio Railroad Company*, 120 So.2d 157 (Miss. 1960), which case is also cited as an erosion of the principles of FELA, the facts were that the Plaintiff had completed his tour of duty "about 11:10 to 11:20 P.M. He went to his boarding house to bathe, dress and then go downtown to a cafe to eat". While at the boarding house, he was injured in a fight with a fellow employee as a result of an argument growing out of an interpretation of the Brotherhood of Trainmen Seniority Rules. In upholding a directed verdict in favor of defendant railroad, the Mississippi Supreme Court said:

> "Plaintiff was not engaged in any work for the railroad company at the time. Neither was he engaged in any business in interstate commerce for the railroad company."

Counsel for Petitioner tried the *Wallace* and the *Hill* cases, and he should recognize the correctness of these decisions. Certainly they do not in any way erode the principles of the Federal Employers' Liability Act. The Mississippi Supreme Court in these cases has done nothing more than follow the rule as stated by Judge Learned Hand and as stated in other cases from the federal courts, which are cited in the *Wallace* case.

Petitioner relies upon the case of *Terminal Ass'n of St. Louis v. FitzJohn*, 165 F.2d 473, 1 ALR 2d 290, (8th Cir. 1948). The evidence which was determinative of the decision in that case is omitted from the statement of the facts as set forth in Petitioner's Brief. The facts were as follows:

From the time of the establishment of the plant to about two months prior to the accident defendant had sent an engine and switch crew into the plant to do the necessary switching. A charge of $3.47 was made for each movement of cars within the plant. This arrangement proved unsatisfactory because defendant's engine and crew were not always available when needed, and the expense was considered undesirable.

An arrangement was worked out between the Government, the defendant railroad and the Railroad Brotherhood, whereby the Government furnished a light switch engine which remained in the plant available at all times. The defendant railroad furnished the crew to man the engine. No one other than employees of defendant railroad could operate equipment on defendant's tracks, so no one other than employees of defendant railroad could constitute the crew conducting the switching operations within the plant. Movement of cars from one section of the plant to another necessitated use of defendant's mainline track and required permission from defendant's yardmaster. The switch crew was subject to the same rules and working conditions applicable to defendant's other employees. The Court said:

> "This arrangement, as we view it, contemplated no change in the employment status of the Plaintiff or of other members of the switching crew and no deprivation of their rights or benefits as employees of the defendants. . ." "The conduct of the plant officials in directing the crew was the conduct which would necessarily be followed in any industry requiring switching by any railroad."

The Defendant railroad in *FitzJohn* maintained some degree of control and supervision over the operation of the switchcrew, whereas Respondent in this case maintained no

control and supervision whatever over Petitioner and the crew of which he was a member. In fact, Petitioner readily admitted that the switchcrew of which he was a member received all its orders and directions from the UPT yardmaster. Thus, the Mississippi Supreme Court distinguished *Fitzjohn* from the case at bar.

The case of *Missouri-Kansas-Texas Railway Company v. Hearson*, 422 F.2d 1037 (10th Cir. 1970) is cited by Petitioner as supporting his proposition that as a matter of law, he was an employee of Respondent at the time of this injury. In so doing, Petitioner ignores the facts which were determinative of the decision in that case, that is, the right of supervision and control. Quoting from that opinion:

> "The record is replete with testimony to the effect that the railroad controlled the significant parts of the car-cleaning operation just as it did before it contracted with Souter and just as it did after Souter terminated the contract shortly after appellee's injury."

> "It was the railroad that determined whether the cars were cleaned properly and whether they should be sent back for recleaning. Testimony was that if the railroad's yardmaster came over to appellee and gave him instructions or told him to sweep out the corners, appellee should and would have complied."

Thus, the distinction between *Hearson* and the case at bar is readily apparent.

Petitioner says that the trial court erroneously followed the case of *Shaw v. Monessen Southwestern Ry. Co.*, 200 F.2d 841, (3rd Cir. 1953), and cites the case of *Valo v. Monessen*

Southwestern Railway Co., 407 F.2d 1400 (3rd Cir. 1968), implying that the *Valo* case overrules the *Shaw* case. The opinion in the *Shaw* case is misinterpreted. The decision there was not on the basis of whether or not Shaw was or was not engaged in interstate commerce as contended, but the determining factor was whose employee was Shaw, that is, under whose control and supervision he was working, and whose work was being done at the time he was injured. Quoting from that case:

> "* * * 'It is agreed that an issue to be decided by the Court is whether or not the plaintiff was engaged in interstate commerce while working for the Monessen Southwestern Railway Company, a common carrier, *or was engaged as an employee of the Pittsburgh Steel Company* in their open hearth department.' This is the sole issue on this appeal." (Emphasis ours.)

In citing *Linstead* and *Hull* the court in listing the factors to be considered, said:

> "* * * When these considerations are added together we find them conclusive *that the plaintiff was, on the day of his injury, an employee of Pittsburgh Steel* from whom he has received compensation under the Pennsylvania Compensation Act." (Emphasis ours.)

The issue in *Valo* was the same as in *Shaw*, that is, whether or not "Valo was the employee of Monessen at the time of the injury." The court said:

> "* * * 'The primary factor to be considered is whether or not the railroad or the steel company had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured.' "

* * * * *

> "The crucial factor is who had the authority to give Valo detailed directions in the performance of his work (Shaw v. Monessen Southwestern Ry. Co., supra). Valo testified that, although a Pittsburgh Steel Company employee had authority to tell him how many loaded 'buggies' to take from the 'stripper' area and where to put them, the Railroad yardmaster was his supervisor."

See Footnotes 407 F.2d 1404 for testimony of Valo in this regard.

In *Valo* the court said that the proof was that "the railroad yardmaster was his supervisor". "Evidence of this factor was absent in the Shaw decision. That opinion is sound law on its own facts." Thus, Petitioner's statement that "the same court that decided Shaw had before it a case identical on the facts" in *Valo* is incorrect.

Petitioner cites the case of *Baker v. Texas & Pacific Ry. Co.*, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed.2d 755, as supporting his position. Again he ignores the facts which make the *Baker* case clearly distinguishable. This Court in the *Baker* case in citing *Linstead* said that "Each case must be decided on its own peculiar facts". Certiorari was granted, the Court holding that a jury question was presented because:

> "* * * Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad; that the road furnished the materials to be pumped into the roadbed; *and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed* by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture." (Emphasis ours.)

Petitioner relies upon the case of *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799. *Sinkler* is completely misinterpreted. In that case *Plaintiff was employed as a cook by Defendant railroad. He was injured while in the performance of his duties for his employer*, when the Belt Railway switching crew caused a car being switched by it to collide with the car in which Plaintiff was working. The situation in this case is entirely different from that in *Sinkler*, because Petitioner here was not engaged in and about the duties of Illinois Central. He was performing the work of UPT and was under its control and supervision at the time of the accident. The rational of *Sinkler* is that Plaintiff as an employee of Missouri Pacific was entitled to the coverage of FELA even though his injuries were caused by a third party, the Belt Railway, which was engaged in switching Missouri Pacific trains about the Terminal area. No question is presented in *Sinkler* as to the employment status of Plaintiff with Missouri Pacific, that being an admitted fact, presupposing supervision and control of Plaintiff's activities by Missouri Pacific. All that this court held in *Sinkler* was that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA," insofar as its own employees are concerned.

The question presented in the case at bar is whether or not Petitioner was an employee of Respondent railroad, a question not at issue in *Sinkler*.

In the case of *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (1965) the Third Circuit Court of Appeals in commenting upon the *Sinkler* case, and the basis of the decision there, said:

"* * * * Sinkler v. Missouri Pacific Railroad Co., supra, heavily relied on by the plaintiff, is inapposite. That case did not consider the question of who is an 'employee' of the railroad for the purposes of the Act, but rather was concerned with *who are 'agents' of the railroad for determining liability to one clearly an 'employee'.*" (Emphasis ours.)

Thus, the distinction between *Sinkler* and the case at bar is apparent.

Petitioner's "Statement of the Case" contains certain factual situations from the record, none of which contain any evidence whatever tending to prove what the courts have held repeatedly in requisite for establishing an employer-employee relationship. They have no bearing whatever upon the supervision and control of Petitioner and his crew at the time of the accident. The evidence is uncontradicted. UPT had the right of control and supervision; it was exercised by and through yardmaster Hornaby. There was no issue of fact for the jury.

IV. CERTIORARI DENIED IN SIMILAR CASES.

This court has denied certiorari in a number of cases wherein the evidence was uncontradicted as here, that the control and supervision was not in the Respondent railroad.

The case of *Quirk v. New York C. & St.L.R. Co.*, 189 F.2d 97 (7th Cir. 1951) Cert. denied, 342 U.S. 871, 72 S.Ct. 105, 96 L.Ed. 655 was an action brought under FELA. The question presented was whether or not the decedent was engaged in interstate commerce within the scope of his employment for Respondent railroad at the time of the accident. In affirming the trial court which had set aside a jury verdict and dismissed the action, the court said:

"There is no dispute as to any material facts, and we agree with the court below that the question for decision is one of law."

The case of *Yarborn v. Reading Co., et al.* 396 F.2d 941, (3rd Cir. 1968) Cert. denied, 393 U.S. 1027, 89 S.Ct. 637, 21 L.Ed.2d 569, likewise was an action brought under FELA, the question at issue being whether or not Plaintiff was under the direction, control and supervision of Respondent railroad so as to make him its employee under the Federal Employers' Liability Act. In affirming a directed verdict in favor of Respondent railroad, the court said:

"The question may be taken from the jury if reasonable men could not reach differing conclusions on the issue."

Where the direction, control and supervision was not in Respondent railroad, the Third Circuit Court of Appeals in *Dell'Occhio v. Pennsylvania Railroad Company*, 233 F.2d 2, (1956) Cert. denied, 352 U.S. 909, 77 S.Ct. 146, 1 L.Ed.2d 117, affirmed a directed verdict in favor of Respondent railroad in an action brought under FELA, the court holding that there was no issue of fact for the jury.

In *Fauvell v. Missouri Pacific Railroad Company*, 347 F.2d 233, (8th Cir. 1965) Cert. denied, 382 U.S. 907, 86 S.Ct. 242, 15 L.Ed.2d 159, the Court affirmed summary judgment in favor of the Respondent railroad. The trial court had held that Plaintiff's decedent was not under the direction, control and supervision of the railroad and therefore, not its employee under the Federal Employers' Liability Act.

Also, see *Valentine v. The Southern Coast Corporation and Southern Pacific Company*, 334 F.2d 244, (5th Cir. 1963)

where the court affirmed summary judgment granted by the trial court in favor of Respondent railroad, it clearly appearing that there were no disputed facts concerning Plaintiff's employment status, the Plaintiff not being subject to the direction, control and supervision of Southern Pacific. The court said:

> "If it appears that reasonable men could not reach differing conclusions on that issue, the question should not be submitted to the jury."

Petitioner's Brief omits the material facts and misinterprets the cases dealing with the question presented in this case. His position is not supported by any authority.

CONCLUSION.

Respondent respectfully submits that, as repeatedly pointed out, the right of direction, control and supervision is the all-important and determining factor. The evidence is conclusive, in fact, undisputed as stated by the Mississippi Supreme Court, that Petitioner and the crew of which he was a member, were under the full and complete direction, control and supervision of UPT, and that at the time of the accident was performing the work of UPT. Petitioner, therefore, had become pro hac vice the employee of UPT, and the decision of the Mississippi Supreme Court was unquestionably correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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This is to certify that copies of this brief have been served on opposing counsel on this the _____ day of October, 1970.